a burden from which it would have been free in a case where there was direct evidence.''

In *Nieble* v. *Winslow*, 83 N. J. L. 191 (Court of Errors & Appeals, 1915), Garrison, J., speaking for the court, said at pages 192, 3:

''The trial judge in the body of his charge repeatedly told the jury that the burden of proving the negligence of the defendant was upon the plaintiff, and explained that the burden of proof meant the duty of establishing negligence by a preponderance of the evidence. After the delivery of these correct instructions, the court charged certain requests preferred by plaintiff's counsel and not withdrawn after hearing the charge, one of which was: 'If you find that the gauze was left in the abdomen of the plaintiff, and the incision sewed up, or allowed to heal up over it, the burden of proof is on the defendant to show that it was not left there by any carelessness or negligence of his.' This was error. Neither the single fact nor the group of facts stated in this request shifted to the defendant the burden of proof which, notwithstanding such facts, remained with the plaintiff. The facts recited in the request were a part of the plaintiff's case, in that they were steps in the establishment of the negligence of the defendant, the burden of proving which was upon the plaintiff; the effect, therefore, of the request was that the jury was told that if the plaintiff had established these steps in its proof of the defendant's negligence, the burden of exculpating himself from the complete charge of negligence was shifted to the defendant.

''This was the precise error for which this court recently reversed the judgment in the case of *Hughes* v. *Atlantic City Railroad Co.*, 85 N. J. L. 212, where the jury was instructed that if the plaintiff proved that he had been injured by the bursting of an electric light bulb, *the burden shifted to the defendant* to exculpate itself from the charge of negligence. The doctrine of *res ipsa loquitur* happened to be involved in that case, but Mr. Justice Swayze, in his opinion, said: 'He (the

trial judge) thus put upon the defendant, in a case where there was no direct evidence of negligence, *a burden from which it would have been free in a case where there was direct evidence.*' The concluding words correctly state the rule applicable to the present case.

"*The same rule is discussed and admirably stated by Mr. Justice Pitney in a recent case in the United States Supreme Court. Sweeney* v. *Erving,* 228 U. S. 233.

"The direct violation of this rule in the present case cannot be condoned upon the ground that plaintiff's counsel may have had in mind the evidential rule as to the duty of going forward with the testimony to overcome a presumption or a *prima facie* case made during the trial. If so, the language of the request was singularly inept for such a purpose; moreover, after the evidence is all in and the jury is being instructed as to its duties in arriving at a verdict, 'the burden of proof' has a fixed and definite meaning. It is not a question of words or of mere form of expression but of a very substantial and fundamental right; as was said by this court in *Bien* v. *Unger,* 64 N. J. L. 596, 'This right of the defendant to have his plaintiff bear the burden of the affirmative is a substantial one and not a mere matter of form'."

We therefore respectfully submit that under the law of New Jersey plaintiffs had the burden of proof to sustain the affirmative of the issue in this case, i. e., "Is insured, Barnett, dead?". That burden remained with plaintiffs throughout the trial and did not shift to defendants. The law of New Jersey placing the burden of proof on plaintiffs is the now prevailing rule in this country and is supported by the following authorities:

Sweeney v. *Erving,* 228 U. S. 233 (United States Supreme Court, 1913);

In re Locust Bldg. Co., Inc. (C. C. A. 2d, 1924), 299 F. 756, at 763;

Falstaff Brewing Corporation v. *Thompson* (C. C. A. 8th, 1937) 89 F. 2d 557, at 561. Cert. den. 302 U. S. 709;

Florida Fruit Canners v. *Walker* (C. C. A. 5th, 1937), 90 F. 2d 753, at 758. Cert. den. 302 U. S. 738;

Equitable Life Assurance Society v. *MacDonald* (C. C. A. 9th, 1938), 96 F. 2d 437. Cert. den. (1938) 305 U. S. 624;

Mutual Life v. *Blodgett* (C. C. A. 4, 1942), 126 F. 2d 273;

Watkins v. *Prudential* (1934), 315 Pa. 497, 173 A. 644, 95 A. L. R. 869;

U. S. A. v. *Tot*, 131 F. 261, rev. on other grounds 319 U. S. 463;

1 Greenleaf (16th ed. 1899), Sec. 14 (x) (3), p. 105. Also Sec. 14 (w) (2) (c'), p. 101, 2;

Wigmore on Evidence (3d ed. 1940), Secs. 2489, 2531;

Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 339. Also p. 355, et seq.;

Moore's Federal Practice, 1942 Supp. to vol. 3, p. 3070, n. 30;

Couch on Insurance, Sec. 2172.

The New Jersey Court of Errors & Appeals has clearly shown by its decision in *Louden* v. *Louden*, 114 N. J. E. 242, that it does not look with favor upon a rule of evidence which permits a verdict to be based on a fact which is presumed but which clearly does not exist. While the "Presumption of Death Statute" permits a presumption that a person is dead, upon proof that he has absented himself from his last known residence, the statute, as applied to this case, probably permits a presumption contrary to fact. Although it is true that the statute must be permitted to operate as a rule of convenience, there is no reason why its effect should be extended to place on defendants the burden

of proof on the only issue in the case. In *U. S.* v. *Provident Trust Co.*, 291 U. S. 272, the United States Supreme Court disapproved a rule of law which permitted an arbitrary presumption to subvert the truth.

The trial judge first instructed the jury that "the burden is upon the plaintiffs to prove by a fair preponderance of the evidence the facts essential to the right of recovery" (p. 526a). Then he contradicted that instruction by saying (p. 527a): "You are instructed that under the provisions of the statute the burden is upon the plaintiffs *in the first instance* to prove not actual death but absence of the insured from either the state or his place of residence for a period of seven years, etc." Why was this burden upon the plaintiff only in the first instance? This burden rested with the plaintiff throughout the case. In fact the burden was heavier than the Court charged because the burden was to prove death and the statute was only important in so far as it provided one method and one alone of proving death by what the law regards as the equivalent of such proof.

The Court then again contradicted the first instruction which was proper, by saying (p. 527a): "You are instructed that under the statute the burden is upon the defendants to prove by a fair preponderance of the evidence that the insured was in fact alive within the period." No doubt the trial court was led into this error and into this contradictory charge by the instructions submitted by counsel for the plaintiffs (pp. 535a, 531a). The trial court attempted to combine the requests of the plaintiff and the requests of the defendant on the question of the burden of proof but they were irreconcilable. This attempt to reconcile is apparent from the instructions of the court (pp. 529a, 530a) where he said:

> "As I stated to you, in the first instance, the burden is on the plaintiffs to establish the elements essential

> to recovery by a fair preponderance of evidence, and I have instructed you that the burden is on the defendants to establish by a fair preponderance of evidence that the insured was, in fact, alive. Now, the question of weight is related to the fair preponderance of evidence."

If the burden was on the plaintiffs not only in the first instance but throughout the trial and on the whole case to establish the elements of their case essential to recovery by a fair preponderance of the evidence, then the burden could not be upon the defendants to establish by a fair preponderance of the evidence that the insured was in fact not dead. The fact that part of this instruction was correct does not cure the error but rather emphasizes it. Unless we conceive of our trial system as one in which the jury is clothed with capacity to decide between two judicial statements of the law and unerringly to select the correct statement and to disregard the incorrect, the error of the charge was not cured or rendered non-injurious. The Court of Errors and Appeals of New Jersey in *State* v. *Erie R. R. Co.*, 84 N. J. L. 661 at 666 (in reversing the trial court) held:

> "If a judge makes a mistake in charging the jury, he may undoubtedly cure it by calling attention to it as a mistake and directing the jury to disregard it or to substitute for it a later statement of the law. Nothing of that sort was done in the present case, where the most that can be said is that two statements of the law were made to the jury, one of which was erroneous. Unless we conceive of our trial system as one in which the jury is clothed with the capacity to decide between two judicial statements of the law and unerringly to select the correct statement and to disregard the incorrect, the error of the charge in the present case was not cured or rendered non-injurious to the defendant who excepted to it."

See also:

Deserant v. *Cerillos Coal R. Co.*, 178 U. S. 409, at 420, 1;
M'Clung v. *Ross*, 18 U. S. 116, 5 L. Ed. 46, at 50;
Western Union Telegraph Co. v. *Hudson* (C. C. A. 9th, 1936), 82 F. 2d 992 (See particularly the concurring opinion of Wilbur, C. C. J., at 998;
Cummings v. *Pennsylvania R. R. Co.* (C. C. A. 2d, 1930), 45 F. 2d 152;
Wisconsin & Arkansas Lumber Co. v. *Ward* (C. C. A. 8th, 1929), 32 F. 2d 974;
American Sugar Refining Co. v. *J. E. Jones & Co.* (C. C. A. 5th, 1923), 293 F. 560, at 562, 3;
Niebel v. *Winslow, supra*, at 194;
State v. *Clayton* (Court of Errors & Appeals, 1912), 83 N. J. L. 673, at 675, 6;
Cella v. *Roth*, 113 N. J. L. 458;
McLaughlin v. *Damboldt*, 100 N. J. L. 127;
Randall's Instructions to Juries, p. 766, sec. 427;
Branson's Instructions to Juries, Sec. 89.

We, therefore, respectfully submit that the Circuit Court of Appeals in affirming the district court's instructions to the jury which placed on defendants the burden of proof on the only issue of the case, has decided an important question of local law in conflict with the applicable decisions of the highest court of the State of New Jersey and petitioners' application for a writ of certiorari should be granted.

II.

Since the inventory and account of receiver (Exhibit D-9) was admissible under 28 U. S. C. 695, its rejection as evidence was error.

After Barnett absconded, a receiver was appointed by the New Jersey Chancery Court for his company, The Dis-

count Corporation of New Jersey. The receiver filed in the Chancery Court an inventory and account which contains cogent evidence with respect to the hopelessly insolvent condition of insured company. The contents of the report may be summarized as follows:

On the second page of the report (p. 87a, Part II) the receiver solemnly states under oath:

> "Deponent states further that most of the important records of account were missing from the office of the said company and deponent believes that the attached audit, made by John W. Fahr, Certified Public Accountant, is the best record available as to the accounts of the said company."

On page 3 of the report, which is the certificate of one of the appraisers (p. 88a, Part II), that appraiser solemnly states under oath:

> "The annexed audit of the book accounts of the Discount Corporation of New Jersey, as made by John W. Fahr, Certified Public Accountant, was accepted by the said Lewis H. Starkey and me as the best information obtainable under the circumstances as many of the records in said office were missing."

The report of the Certified Public Accountant who was retained by the receiver to examine the books and records of Barnett's Discount Corporation of New Jersey, which report is made part of the inventory and account of the receiver, contains the following pertinent facts (90a, 91a, Part II):

> "In accordance with your request, I have made an examination of the records of the Discount Corporation of New Jersey to determine its financial condition as of January 24, 1933, the date of your appointment as receiver.

"The conclusions arrived at are not complete and cannot be made so at the present time owing to the following reasons:

1. A complete set of records was never made.
2. All cancelled checks and bank statements are missing.
3. All check books and stubs are missing except

   Savings Investment and Trust Co. from July 6, 1932 to January 24, 1933.
   Essex County Trust Co. from July 3, 1929 to September 4, 1930.

4. Minute Book not kept after September 3, 1930.
5. Cash receipts not complete for 1932.
6. No record of cash disbursements for 1932.
7. Errors and omissions in record extant.
8. Incomplete correspondence files.

"From the above it will be seen that prior to the disappearance of Mr. Robert J. Barnett, the president, about December 23, 1932, he apparently destroyed all the records of the corporation which were under his control.

"From a comparison of the records extant and copies of bank statements, there was revealed during 1931 and 1932 many deposits and checks of comparatively large amounts which cleared through the banks, and for which no apparent entries were made in the corporate records. The checks exceeded the deposits by over $50,000.00. I have been unable to get any definite information concerning the nature of these transactions. The net result however proves that the records extant are not complete nor reliable. Of the transactions handled entirely by Mr. Barnett personally there is no existing records.

"In the accompanying Statement of Known Assets and Liabilities and Deficit at January 24, 1933, I have only included such items as can be established with some degree of accuracy."

The Statement of Known Assets and Liabilities and Deficit prepared by the Certified Public Accountant which is part of D-9 (p. 92a, Part II) shows a deficit of $45,300.75 in a corporation which had total assets of $31,158.85.

There can be no question about the materiality about the evidence contained in Exhibit D-9. The law is well settled in all jurisdictions that any fact or circumstance relating to Barnett's character, habits, condition, affections, attachments, prosperity and objects of life, which usually control the conduct of men and are the motives of their actions, was, so far as it tended to characterize his disappearance or throw light on his intentions, competent evidence on the ultimate question—"Is insured Barnett dead?"

Meckert v. *Prudential Ins. Co.*, 114 N. J. L. 320;
Tyrrell v. *Prudential Ins. Co.*, 109 Vt. 6;
In re: *Wagener*, 128 N. Y. S. 164;
Petition of Talbot (Supreme Judicial Court of Massachusetts, 1925), 250 Mass. 517, 146 N. E. 1 at p. 2;
Wilson v. *Prudential Ins. Co.* (Supreme Judicial Court of Maine, 1933), 166 Atl. 57 at p. 59;
Butler v. *Mutual Life* (Court of Appeals of New York, 1919), 225 N Y. 197, 121 N. E. 758 at p. 760;
Penn. Mut. Life Ins. Co. v. *Tilton* (10 C. C. A. 1936), 84 F. (2d) 10;
Equitable Life Assurance Society v. *Sieg* (C. C. A. 6th, 1931), 53 F. 2d 318 at 319;
Fuller v. *New York Life Ins. Co.* (C. C. A. 3d, 1912), 199 F. 897 at 899;
Southland L. Ins. Co. v. *Norwood*, 76 S. W. 2d 166;
Equitable Life Assurance Society v. *James*, 73 Ind. App. 186, 127 N. E. 11 at 12;
O'Kelly v. *Felker*, 71 Ga. 775;
Appleman—Insurance Law and Practice, Volume 2, Section 722, note 9, *et seq.*;

Chamberlayne—Modern Law of Evidence, Volume 2, Section 1117;
Lawson—Law of Presumptive Evidence, Rule 53, p. 294;
Stephen—Digest of Law of Ev., art. 99;
Couch on Insurance, Sec. 2228 n. 14 *et seq.*, pp. 7226, 7;
Annotation, 44 A. L. R. 1488;
Rule 43 (a), Federal Rules of Civil Procedure.

The inventory and account of the receiver was competent evidence under 28 U. S. C. 695 which reads as follows:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind. (June 20, 1936, c. 640, § 1, 49 Stat. 1561.)"

This court had occasion to consider that statute in *Palmer* v. *Hoffman*, 318 U. S. 109, but the evidence sought to be introduced in that case differed essentially from the document rejected in the case *sub judice*. We respectfully submit that the question as to whether or not the inventory and account of the receiver (Exhibit D-9) should have been admitted by the court below presents an important question

of federal law which has not been but should be decided by this court.

The interpretation placed on 28 U. S. C. 695 by Clark, C. C. J., speaking for the Second Circuit in *Ulm* v. *Moore-MacCormack Lines* (1940), 115 F. (2d) 492, and *idem* (1941) 117 F. (2d) 222, sustains the competency of the exhibit.

Exhibit D-9 offered by defendants was the original document filed in the New Jersey Chancery proceedings by the receiver. It was brought from the Chancery office by one of that Court's representatives. There is no question involved herein with respect to whether the document was properly authenticated under Rule 44 of the Federal Rules of Civil Procedure. When the receiver Ellis, the appraiser Campbell, and the accountant Fahr made up the inventory and account which was rejected in its entirety by the trial Judge there was absolutely no possible motive for any of them to misstate any facts and the rejection of the document was not in accordance with the spirit of the recent decision of this court in *Palmer* v. *Hoffman*, 318 U. S. 109. Any reasonable person would believe the statements of the receiver Ellis, the appraiser Campbell and the accountant Fahr which are contained in the report in any matter however grave and serious. Certainly the inventory and account would be accepted at its face value by any competent businessman. Title 28 U. S. C. 695 and Rule 43 (a) of the Federal Rules of Civil Procedure, clearly provide that it should be admitted in evidence and its rejection by the trial Judge constituted a narrow, legally erroneous ruling which has done great harm to defendants.

Hoffman v. *Palmer* (C. C. A. 2d, 1942), 129 F. 2d 976;

Freedman v. *Mutual Life* (Supreme Court of Pennsylvania, 1941), 342 Pa. 404, 21 Atl. (2d) 81, 85, 135 A. L. R. 1249;

In re: *Fennerstein's Champagne*, 3 Wall. 145, 18 L. Ed. 121, 70 U. S. 145;

United States v. *Quick* (C. C. A. 3d, 1942), 128 F. 2d 832;

Overfield v. *Pennroad Corporation* (D. C. E. D., Pa., 1941), 42 F. Supp. 586, at 628;

Dissenting opinion of Cardozo, J. in *Great Northern Ry.* v. *Washington*, 300 U. S. 154, at 172, et seq.;

United States v. *Mortimer* (C. C. A. 2d, 1941), 118 F. 2d 266, cert. den. 314 U. S. 616;

5 Wigmore on Evidence, 3d ed. 1940, Sec. 1530;

Morgan et al.—The Law of Evidence, Some Proposals for Its Reform (1927), c. 5.

Despite the contention of plaintiffs that all the evidence sought to be proved by defendants through Exhibit D-9 was already before the jury, the fact is that the following statements contained in the report of the Certified Public Accountant Fahr were not proved in any other way:

1. A complete set of records of the Discount Corporation of New Jersey was never made.
2. All cancelled checks and *bank statements* were missing.
3. All check books and stubs were missing except Savings Investment & Trust Company from July 6, 1932 to January 24, 1933, and Essex County Trust Co. from July 3, 1929 to September 4, 1930.
4. The minute book for the corporation was not kept after September 3, 1930.
5. The cash receipts were not complete for 1932.
6. There were errors and omissions in records extant.
7. The correspondence files were not complete.

All of the foregoing facts would have a definite bearing on the issue as to whether or not Barnett is dead or is in hiding. The defendants were entitled to the benefit of the

high quality of proof of the foregoing matters in the solemn report of the receiver for the Discount Corporation of New Jersey presented to the Chancellor of New Jersey in the insolvency proceedings. It is difficult to conceive evidence of a higher quality than that contained in Exhibit D-9 and it is unfair to the defendants to require them to pay a judgment resulting from a trial in which they were not permitted to present this evidence to the jury.

In its opinion the Circuit Court of Appeals treats the question as follows:

> "The appellants offered in evidence a copy of the inventory of this particular company called 'The Discount Corporation.' It was offered for the purpose of showing that the company was insolvent at the time the assured disappeared. That fact was already in this trial record; the decree of the Court of Chancery to that effect being in evidence. The inventory contained conclusions of appraisers and an auditor."

In *Equitable* v. *Sieg*, 53 F. (2d) 318, the Circuit Court of Appeals for the Sixth Circuit had before it a similar problem in a disappearance case. That court said at page 319:

> "Appellants also assert error in the exclusion by the court, over the objection of the defendants, of secondary evidence as to the alleged amount of the defalcation of Joseph L. Sieg. Witnesses were permitted to testify that Sieg's shortage was 'in excess of several thousands of dollars,' but the fact that it was in excess of $12,000 was excluded. The books of account had since been lost, but there was available the testimony of one Verne George, who had come to Pittsburgh and had taken over the office of Sieg's employer there on the day following Sieg's disappearance. The books were audited at that time under Mr. George's supervision, as well as by the firm of Zopher L. Jensen & Co. on behalf of the sureties. The report of the latter company to the United States Fidelity & Guaranty

Company, surety for the period from July 1, 1920, through December 17, 1920, showed an amount of defalcation during that period, after specific deductions, in an amount in excess of $6,000. Testimony of Mr. George was offered to the effect that separate audits likewise disclosed a defalcation prior to July 1, 1920, in the amount of at least $6,000, which was paid by the National Surety Company. While the summary of an accountant of an examination made by him is ordinarily inadmissible except upon production of the books and documents from which such summary was made, and an opportunity for opposing counsel to examine or use such books to verify the correctness of the accountant's report, the books here involved were lost and could not be produced. The witnesses were wholly disinterested as concerned the then present controversy. At the time of his disappearance the insured was indebted at the bank in an amount of nearly $3,000. His salary was $5,000 per year, and he had less than $100 in cash. He had tried to borrow money, and had failed. The evidence offered thus constituted not only the best evidence available, but the only means of establishing a defalcation, which, to a man with a family and in the circumstances above recited, must have seemed staggering in amount. To permit evidence that the defalcation was 'in excess of several thousand dollars,' which the plaintiff attempted to meet by testimony that the insured might have borrowed money in a 'reasonable amount' had he desired to do so, was to deprive the defendants of a large measure of the probative value of their evidence. This demonstrates the prejudice thereby suffered."

We respectfully submit defendants were entitled to have presented to the jury the inventory and account of receiver. The offering in evidence of a decree of insolvency is not a substitute for the positive proof contained in D-9 showing the extremely hopeless financial condition of Barnett's Discount Corporation of New Jersey. The colloquy (pp.

344a-347-a) which followed the offer of Exhibit D-9 is also important. It reflects the attitude of the trial Judge which was contrary to the letter and spirit of Rule 43 (a) and 28 U. S. C. 695. Plaintiffs argued in their briefs filed below that Exhibit D-9 was offered merely to show insolvency on the part of Barnett's company. This is not so, as appears from the statements of defendants' trial counsel (p. 346a):

> "Mr. Markley: The purpose of it is—it is the report of the receiver who was put in charge by the Court—of what assets the company had. Now, your Honor of course knows *that I have tried to prove the lack of assets, and the objection has been that it wasn't accurate for me to prove, because the people didn't know what assets they had. I asked that of Simpson and I asked that of the previous witness, Van Cleve. Now, here I am in the position to offer demonstrative evidence of what assets and what liabilities this company had, and that is the purpose of the offer of this report of the receiver and his accounts.* Of course, if your Honor feels that that isn't proper I bow to your Honor's ruling."

For the foregoing reasons we respectfully submit that the Circuit Court of Appeals in affirming the district court's rejection of the inventory and account of receiver (Exhibit D-9) which was clearly admissible under 28 U. S. C. 695 has decided an important question of federal law which has not been but should be considered by this Court.

Wherefore, it is respectfully submitted that the writ of certiorari prayed for should be granted.

EDWARD A. MARKLEY,
Attorney for Petitioners.